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SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-426

LAKE CARRIERS' ASSOCIATION and
AMERICAN STEAMSHIP COMPANY, *et al.*,
Appellants,

vs.

RALPH A. MacMULLAN,
Individually and as Director,
Michigan Department of Natural Resources, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

MOTION FOR TEMPORARY RESTRAINING ORDER.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

MOTION FOR TEMPORARY RESTRAINING ORDER.

To the Honorable Associate Justice Potter Stewart,
Justice for the Sixth Judicial Circuit:

Now come the appellants in the above entitled cause and respectfully move the Court and the single Justice to whom this Motion is presented that the temporary restraining order originally issued by the United States District Court, Eastern District of Michigan, Southern Division, in Civil Action No. 36194, entered March 16, 1971, be reinstated pending appeal to this Court.

In support of said Motion appellants respectfully show:

I. On March 16, 1971 appellants instituted an action in the United States District Court, Eastern District of Michigan, Southern Division, pursuant to 28 U.S.C. §§ 1131, 1133, 1337, 2201, 2281 and 2284, to test the con-

stitutional validity of the Michigan Watercraft Pollution Control Act of 1970 (Appendix G to Jurisdictional Statement). On said date the Honorable Ralph M. Freeman, District Judge, entered a temporary restraining order enjoining certain officials of the State of Michigan from enforcing the Michigan Watercraft Pollution Control Act of 1970 as against appellants' federally licensed vessels engaged in interstate and/or foreign commerce on the Great Lakes (Appendix B attached to Jurisdictional Statement).

2. On April 26 and 27, 1971, a full evidentiary hearing was conducted following which the Court heard oral arguments and requested the submission of briefs.

3. On July 12, 1971 the District Court rendered its Memorandum Opinion dissolving the existing temporary restraining order and dismissing the action without prejudice to plaintiffs' instituting other appropriate legal proceedings (The District Court's Memorandum Opinion attached as Appendix A to Jurisdictional Statement).

4. On July 29, 1971, appellants filed in the District Court a motion to reinstate the temporary injunction pending appeal (Motion in District Court attached as Appendix D to Jurisdictional Statement; Brief in Support of Motion attached as Appendix E to Jurisdictional Statement).

5. On September 15, 1971 the District Court rendered its opinion and order (attached hereto as Exhibit A) denying appellants' motion to reinstate the temporary restraining order originally entered March 16, 1971.

6. In denying appellants' motion to reinstate the temporary injunction, the District Court held that an injunction from a federal court suspending the possible enforcement of the Michigan statute was not appropriate until the statute had been interpreted by a Michigan Court, relying upon *Askew vs. Hargrave,* 401 U.S. 476 (1971) and *Reetz vs. Bozanich,* 397 U.S. 82, 85 (1970).

7. Appellants respectfully submit that the District Court's reliance on *Reetz v. Bozanich, supra,* is misplaced in that such case involved a classic example of where the nub of the controversy turned on the state constitution. Consequently it was appropriate for a state court to make the first judicial application of the state constitutional provisions involved. This Court has said, however, that the judicially created rule of abstention should be applied only where "the issue of state law is uncertain." *Harman v. Forssenius,* 380 U.S. 528 (1965). Moreover, abstention is applicable only in narrowly limited special circumstances. *Zwickler vs. Koota,* 389 U.S. 241 (1967). In this instance a state court construction could not render unnecessary a decision of the federal issues joined on the pleadings and the evidence in the trial court. Thus there are no special circumstances warranting application of the abstention doctrine.

8. Appellants respectfully submit that a federal court has the duty of giving due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims; that a statutory construction by the state courts of the Michigan Watercraft Pollution Control Act of 1970 would not avoid or modify the constitutional question; that the principle of abstention cannot be used simply to give the state courts the first opportunity to vindicate a federal claim; and that the delay from requiring recourse to the state courts might "chill" the federal constitutional right which appellants seek to protect because appellants appeal will be rendered moot if Michigan is permitted to enforce its Act during the pendency of this appeal, all as more fully appears from the brief submitted herewith as Appendix E to the Jurisdictional Statement.

9. Even were the District Court correct in applying the abstention doctrine, it should have, in accordance with *City of Meridian vs. Southern Bell Tel. & Tel. Co.,* 358 U.S.

639 (1959), held the case while the parties repaired to a state tribunal for an authoritative declaration of applicable state law. Instead, the District Court dismissed the complaint without prejudice and dissolved the temporary restraining order, thus leaving appellants in the intolerable situation of not being able to enter Michigan waters except in violation of law.

10. Appellants respectfully submit that the issues in this case are simple and straightforward. Can the State of Michigan, as a prerequisite to federally licensed vessels engaged in interstate and foreign commerce entering its waters, require that such vessels install holding tanks or incinerating devices? This involves no delicate issue of state law. The Michigan Watercraft Pollution Control Act of 1970 is not susceptible of a construction by the state courts that would avoid or modify the constitutional questions involved.

11. Unless the status quo is preserved pending appeal, appellants will be compelled to proceed with the installation of holding tanks or incinerating devices thus causing them irreparable damage and injury should they be successful on this appeal, which for all practical purposes will be rendered moot.

It is respectfully requested that this Honorable Court reinstate the temporary injunction originally entered on March 16, 1971 pending this appeal.

Respectfully submitted,

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EXHIBIT A.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

Civil Action No. 36194.

LAKE CARRIERS' ASSOCIATION and
AMERICAN STEAMSHIP COMPANY, *et al.*,

Plaintiffs,

vs.

RALPH A. MacMULLAN, *et al.*,

Defendants.

OPINION AND ORDER.

Before EDWARDS, *Circuit Judge,* and KEITH and PRATT, *District Judges.*

PRATT, *District Judge.*

Plaintiffs in this proceeding have filed a motion requesting a continuation of the temporary restraining order entered prior to the hearing in this cause or other similar injunctive relief to prevent enforcement by the State of Michigan of Act 167, Public Acts of 1970, pending an appellate court ruling on this Court's opinion and order of July 12, 1971. The effect of the July 12, 1971 order was to dissolve the pre-existing temporary restraining order and dismiss the action.

Plaintiffs' motion was accompanied by an extensive brief as was defendants' response in opposition to the motion. By agreement of the parties, the motion will be considered on the briefs without oral argument.

The authority of this Court to grant an injunction is not questioned. It continues throughout the period of

appeal. Federal Rules of Civil Procedure Rule 62(c), 28 U.S.C.; *Newton v. Consolidated Gas Company*, 258 U.S. 165, 177 (1922); *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 79 (C.A. Cal. 1951).

However, the Rule provides that the decision to grant an injunction is a matter within the discretion of the Court. It is, therefore, incumbent upon plaintiffs to establish that immediate and irreparable injury will result if injunctive relief is withheld. This plaintiffs have not done.

This Court's earlier opinion indicated that an injunction from a federal court suspending the possible enforcement of the Michigan statute was inappropriate until the statute had been interpreted by a Michigan Court. Thus this Court dissolved the existing temporary restraining order, dismissed the action, and abstained from further determinations. This holding is strengthened by the recent decision of *Askew v. Hargrave*, 401 U.S. 476 (1971) which strongly endorsed the abstention guidelines of *Reetz v. Bozanich*, 397 U.S. 82, 85 (1970).

Moreover, plaintiffs have indicated no change in the facts of this case nor the attitudes of those Michigan officials charged with enforcing the statute in question that would indicate a threat of immediate and irreparable harm to plaintiffs. In their response to the motion, defendants have again indicated that the State of Michigan hopes to obtain compliance with its water pollution standards without resort to criminal prosecution. To enjoin the enforcement of a statute under which prosecution is neither pending nor foreseeable would be an idle gesture.

For the reasons given, plaintiffs' motion must be DENIED. IT IS SO ORDERED.

/s/ GEORGE C. EDWARDS, Jr.,
United States Circuit Judge,

/s/ DAMON J. KEITH,
United States District Judge,

/s/ PHILIP PRATT,
United States District Judge.

Dated: September 15, 1971.

No. 71-422

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, et al.,

Appellants,

vs.

RALPH A. MacMULLAN, Individually and as Director, Michigan Department of Natural Resources, et al.,

Appellees.

On Appeal from the United States District Court
For the Eastern District of Michigan
Southern Division

RESPONSE IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER

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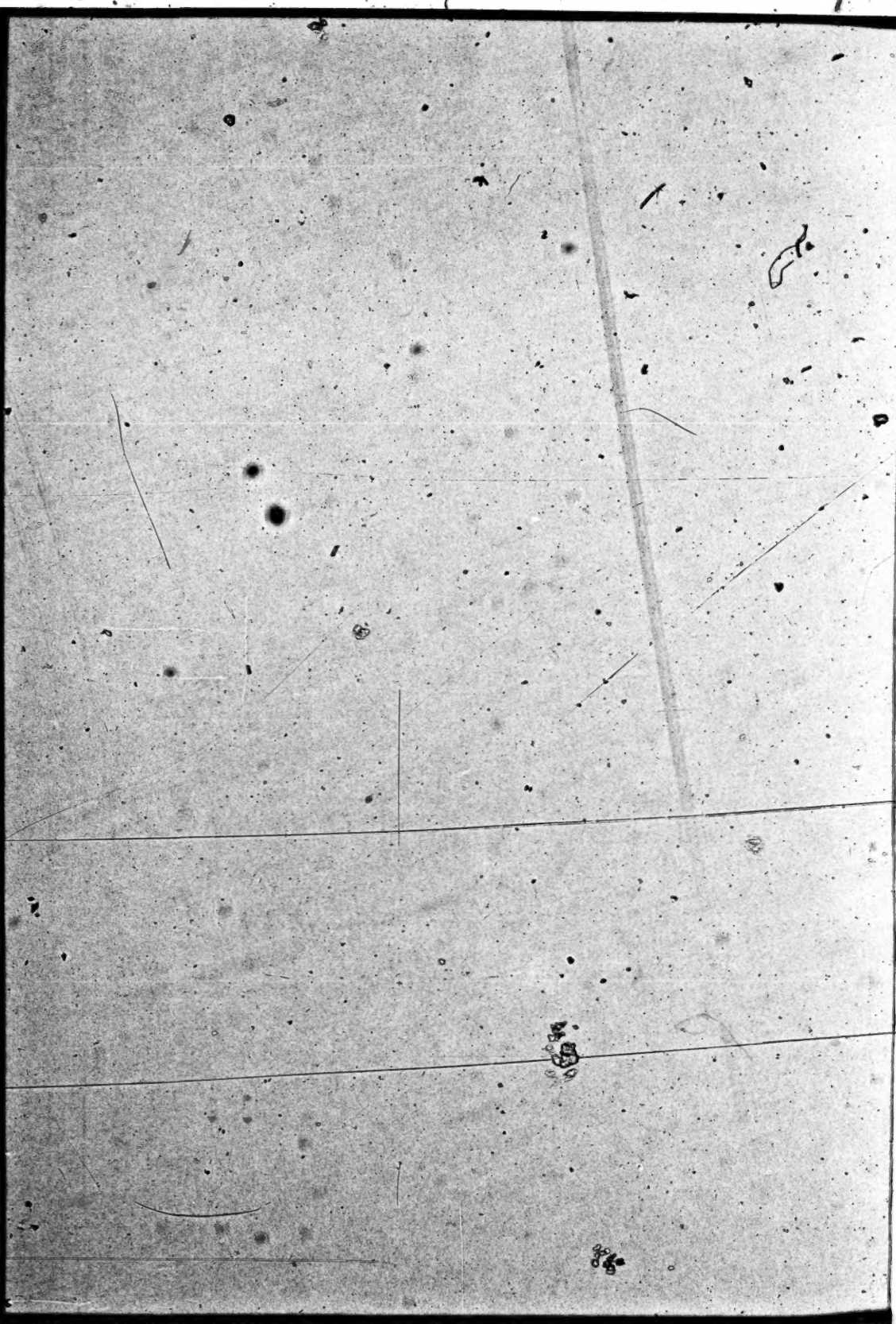

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Appellees.

On Appeal from the United States District Court For the Eastern District of Michigan Southern Division

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RESPONSE IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER

NOW COMES the State of Michigan to respectfully oppose the Motion for Temporary Restraining Order, or in the alternative, that the District Court Opinion and Order dated September 15, 1971, attached hereto as Appendix A, and denying appellants' motion to reinstate the temporary restraining order entered March 16, 1971, be affirmed.

I.

THE PROCEEDINGS IN THE DISTRICT COURT

In support of said motion, appellees respectfully show:

1. That, after full evidentiary hearings on April 26 and 27, 1971, oral arguments and submission of briefs, the District Court, on July 12, 1971, rendered its Memorandum Opinion dissolving the temporary restraining order issued to appellants on March 16, 1971, and dismissed the action without prejudice to appellants instituting other appropriate legal proceedings. (The Memorandum Opinion is Appendix B attached to appellees' Motion to Dismiss Appeal; and is hereto attached as Appendix B.)

2. The District Court's Memorandum Opinion, on the evidence presented, held that appellees have sought the voluntary cooperation of appellants in implementing Act 167 of the Public Acts of 1970, State of Michigan, and have not instigated nor threatened criminal prosecution of appellants under the statute and, upon the facts presented, prosecution of appellants does not appear imminent.

3. The Memorandum Opinion further held that appellants sought merely an advisory opinion effecting prohibition of state action in the field of Great Lakes water pollution until the federal government manifests its intention and takes control.

4. The District Court's Opinion and Order of September, 15, 1971, in denying appellants' Motion of July 29, 1971, requesting reinstatement of the temporary injunction pending appeal, held that appellants had failed to establish any facts that would indicate a threat by appellees of immediate and irreparable harm to appellants if injunctive relief was withheld.

II.

ARGUMENT

1. Federal interference with a state's good-faith administration of its criminal statutes is peculiarly inconsistent with the federal framework and a showing of special circumstances beyond the injury to every proceeding brought lawfully and in good faith is requisite to a finding by this Court of irreparable injury sufficient to justify the extraordinary writ of injunction appellants here seek. *Dombrowski* v *Pfister*, 380 US 479 (1965); *Cameron* v *Johnson*, 390 US 611 (1968); *Wilson* v *Schnettler, et al*, 365 US 381, 385-386 (1961).

2. This Court may not enjoin the conduct of state officials which is neither threatened nor imminent, and this Court cannot assume, on the record presented by appellants, that appellees will act in such manner as to deprive appellants of their constitution rights and, further, on the evidentiary record there is no state agency or officer that could be sensibly enjoined so as to afford appellants the injunctive relief they now request. *Boyle* v *Landry*, 401 US 77, 27 L Ed 2d 696, 91 S Ct 758 (1971); *Younger* v *Harris, Jr., et al.*, 401 US 37, 27 L Ed 2d 669, 91 S Ct 746 (1971).

3. Even assuming Act 167 of the Public Acts of 1970, State of Michigan, is unconstitutional, which is denied, that fact would not justify present injunctive relief against good-faith attempts to enforce it, and appellants have failed to make any showing to the District Court of bad faith, harassment, or any other unusual circumstances that would call for grant of that relief. *Younger* v *Harris, Jr., et al*, supra [27 L Ed 2d 669, 681 (1971)].